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EHQ PROJECTS SDN BHD & ORS

v.

EQUIPRO SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-1520-2006]
29 AUGUST 2007

C ***CIVIL PROCEDURE:*** *Injunction - Mareva injunction - Principles applicable - Action for recovery of monies premised upon fraudulent sale of goods - Whether there was a real risk of assets being dissipated - Whether serious question to be tried - Whether balance of convenience lay in favour of granting injunction - Whether injunction should be refused on*
D *grounds that plaintiff also privy to alleged fraud and therefore had unclean hands*

The plaintiffs applied for an injunction *(inter partes)* against the 1st, 2nd and 3rd defendants to restrain them from disposing, dealing
E or diminishing the value of any of the defendants' assets up to the value of RM1.5 million pending the trial of this suit. The plaintiffs alleged that the 3rd defendant had conceived of a scheme to defraud the plaintiffs into taking a loan from MIDF to purchase light and sound equipments for the 1st plaintiff company. The
F scheme obliged the 1st plaintiff upon approval to release the approved sum of RM1.5 million from MIDF to the 1st defendant company to enable them to purchase the light and sound equipments. The 2nd and 3rd defendants were directors of the 1st defendant company. The plaintiffs contended that they were
G deceived into signing all the documents relating to the release of the loan by MIDF including the acknowledgement of delivery of the equipments in order that MIDF will release the loan sum to the 1st defendant. The plaintiffs claimed that they had not received the equipments although they had acknowledged the
H delivery and receipt of all the 12 items and had also authorized MIDF to release the loan to the 1st defendant company. After the loan was released into the account of the 1st defendant company the 2nd and 3rd defendants then withdrew it *vide* two cash withdrawals of RM750,000 each. The defendants denied the
I alleged fraud and contend that the light and sound equipments had in fact been delivered to the 1st plaintiff. Counsel for the defendants also submitted that the plaintiffs themselves were

parties to the alleged fraud. The purpose of the plaintiffs' application here was to arrest the money which MIDF had released to the 1st defendant and which the 2nd and 3rd defendants had taken out.

Held (allowing the application):

(1) At this stage all that the plaintiffs needed to show was that there was a serious question to be tried following which the court had to decide where the balance of justice lay. The court was satisfied that there was a serious question to be tried on the core issue whether the 12 items of light and sound equipments had been delivered to and received by the 1st plaintiff. (paras 10 & 12)

(2) The court was unable to conclude at this stage that the plaintiffs may have entered into any illegal transaction with the defendants. The submission that they should not be entitled to the injunction by reason of their unclean hands was therefore untenable at this stage. These were necessarily matters which could only be resolved at the trial. (para 19)

(3) The balance of justice lay in favour of the plaintiffs. Given that the RM1.5 million were so hurriedly and surreptitiously withdrawn from the bank account of the 1st defendant by the 2nd and 3rd defendants and given that the search conducted by the plaintiffs at the Registry of Companies had disclosed that the 1st defendant had not filed any financial nor any profit and loss statements since it was incorporated on 2 September 2005, the risk of dissipation was therefore real and not improbable. (paras 20 & 21)

Case(s) referred to:
American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 29 r. 1(2B)

For the plaintiffs - Won Walter Pereira; M/s Kamarudin & Partners
For the 1st, 2nd & 3rd defendants - Steven Thiruneelakandan (David Dinesh Mathew with him); M/s Shook Lin & Bok
For the 4th defendant - Amir Amree; M/s Sidek Teoh Wong & Dennis

Reported by Amutha Suppayah

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JUDGMENT

Kang Hwee Gee J:

[1] This is an application by the plaintiffs for an injunction *(inter partes)* against the 1st, 2nd and 3rd defendants to restrain the 1st, 2nd and 3rd defendants from disposing, dealing or diminishing the value of any of the defendants' assets up to the value of RM1.5 million pending the trial of this suit.

[2] The facts justifying this application is set up in the supporting affidavit of the 2nd plaintiff (encl. 3) as follows:

1. I am the Second Plaintiff named hereinabove and am duly authorized by the First and Third Plaintiff to affirm the affidavit for and on behalf of the Plaintiffs.

2. Save and except where otherwise stated, all the facts deposed to therein are within my knowledge and/or derived from documents kept in the possession of the Plaintiffs.

3. I crave leave of this Honourable Court to refer to the Writ of Summons and Statement of Claim, and the Summons In Chambers filed herein for an injunction order.

4. I verily aver that the First Plaintiff is an events organizer and has contracts with Sistem Televisyen Malaysia Berhad (TV3), Metropolitan TV Sdn Bhd and Tiga Events Sdn Bhd. Both the Third Plaintiff and I are directors of the First Plaintiff.

5. In November 2005, the Third Defendant of Victom Sdn Bhd entered into an agreement with the First Plaintiff to purchase a lighting system worth over RM600,000.00, which system was in turn to be rented out to the Plaintiffs.

6. In July 2006, the Plaintiffs tried to secure financing to purchase further equipment, that is, Meyer Sound speakers, for the expansion of the First Plaintiff in view of the contracts secured. However, we were unsuccessful.

7. The Third Defendant, through the First Defendant offered his assistance in securing financing in consideration of which, the First Defendant shall be the supplier of the said equipment.

B C D E F G H I

8. I verily aver that in a scheme devised by the Third Defendant, a shadow director of the First Defendant, the Plaintiffs were to be the borrowers of the sum of RM1,500,000.00 from the Malaysian Industrial Development Finance Berhad (MIDF), which loan sum shall be released to the First Defendant, who was to utilize the said moneys to purchase the said equipment. The 3rd Plaintiff and I agreed to be personal guarantors to the said loan from MIDF.

9. The Plaintiffs were persuaded to execute all documents by the Third Defendant including a delivery order to ensure release of the loan sum of RM1,500,000.00 from MIDF to the First Defendant, although no delivery was the made. The Defendants informed the Plaintiffs that that was the procedure or how the transaction was done to enable the Plaintiff to obtain financing. A copy of the Loan Agreement, Debenture and Delivery Order are now produced before me and annexed herewith and marked as Exhibits "ACW-1", "ACW-2" and "ACW-3" respectively.

10. The loan sum was duly released to the First Defendant, who were obliged to purchase and supply the said equipment to the Plaintiffs. Instead the Defendants absconded with the loan sum.

11. The Plaintiffs made several attempts to locate the Third Defendant to refund the moneys as the said equipment was not supplied to the Plaintiffs, but all the attempts were futile. The Third Defendant has intercession of this Honourable Court to dispense with personal service by leaving the Order of Court at his last known address at No. 13, Jalan Saga SD 8/3, Bandar Sri Damansara, Kuala Lumpur. A copy of the list of this various addresses is now produced before me and annexed herewith and marked as Exhibit "ACW-4".

12. In view of the breach committed by the 1st Defendant, the Defendants ought to be compelled to return the full loan sum of RM1,500,000 so that the disbursed loan sum shall be refunded to the financier, MIDF.

13. I am advised by my solicitors and verily believe that unless an injunction order is granted to freeze the banking accounts and assets of the Defendants upto the sum of RM1,500,000.00, the said money would be dissipated and made irrecoverable to the Plaintiffs.

14. I am further advised by my solicitors and verily believe that the balance of convenience lie in favour of the Plaintiffs to grant injunctive relief.

15. I verily aver that the Plaintiffs through our solicitors undertake to abide by any order this Honourable Court may make as to damages in case this Honourable Court should hereafter be of the opinion that the Defendants shall have sustained any by reason of this Order which the Plaintiffs ought to pay.

COMPLIANCE WITH ORDER 29 RULE 1(2A) RHC 1980

16. The facts giving rise to the claim are as set out in this Affidavit and in the Writ of Summons filed herein.

17. The facts giving rise to the claim for an interlocutory relief are as set out in this Affidavit and the Writ of Summons filed herein.

18. The facts relied on to justify the application *ex parte* are as adumbrated hereinabove and no notice of this application is intended to be given to the Defendants as any notice given would result in the delay of the hearing of this urgent *ex parte* application. Further, any notice would not only delay the hearing but would cause damage to the *status quo* as there is a real risk that the Defendants would upon notice expedite my removal.

19. I respectfully state that I know of no answer, which the Defendants may assert in reply to these proceedings other than what I have disclosed in this Affidavit.

20. I know of no other facts which might lead this Honourable Court not to grant the *ex parte* application sought.

21. I have made no other previous similar *ex parte* applications to any other Judge of this Honourable Court.

22. The precise relief sought is as appears in the Summons in Chambers herein and I respectfully repeat and adopt the same.

23. In the circumstances, I respectfully urge this Honourable Court to grant an order in the terms of my application.

[3] The parties are agreed that the application is to be resolved on the factual issue of whether the 12 items of light and sound equipments were delivered to the plaintiffs.

[4] The parties are also agreed that the defendants' applications (encls. 18 and 21) to set aside the interim injunction granted *ex parte* by the late Justice Abdul Wahab Said Ahmad are to be heard together with this application.

Submission By Counsel For The Defendants

1. This is essentially a dispute between the plaintiffs and the 1st, 2nd and 3rd defendants which arises out of goods sold and delivered. The goods here are light and sound equipments. The 1st defendant is the seller of the goods and had agreed with the 1st plaintiff that the goods to be sold at a price of RM2,060,400. The 1st plaintiff was the purchaser of the goods. The 1st plaintiff applied for a machinery or equipment loan of RM1.5 million from the 4th defendant who was the financier. For the purposes of this loan there were 2 important documents – i) a letter of offer from the 4th defendant to the 1st plaintiff; and ii) a loan and debenture agreement between the 1st plaintiff and the 4th defendant which allowed the 4th defendant to repossess the goods in the event of default of repayment. The goods were delivered by the 1st defendant to the 1st plaintiff on 16 August 2006 and there is an expressed acknowledgement of the receipt of the goods on the delivery order by the 2nd plaintiff. The 1st plaintiff through the 2nd plaintiff then issued the letter of authorisation to the 4th defendant financier to release the loan to the 1st defendant supplier. The release of the loan by the 4th defendant was made upon its satisfaction that the goods had been delivered to the 1st plaintiff. Then the delivery of the goods also confirmed by the employee of the 1st defendant Oh Chee Kok, general manager of the 1st defendant. The delivery had been confirmed independently by the insurers appointed by the 4th defendant Allianz General Insurance Malaysia Berhad by the affidavit of its adjuster Sharuazhan bin Salleh who had himself gone to the premises of the 1st plaintiff and confirmed that the goods had been delivered before issuing the cover note for insurance purpose.

2. The 3rd defendant is not a shadow director of the 1st defendant. His role was as an introducer and he introduced the 2nd and 3rd plaintiffs to the 2nd defendant supplier. The 3rd defendant is in fact a director of the company called Victom Sdn Bhd who had previous dealings with the 2nd and 3rd plaintiffs.

3. It is the plaintiffs' case originally that there was a scheme by the 3rd defendant to defraud the 4th defendant. Subsequently and after obtaining the *ex parte* order, they amended the claim and the relief and they are now saying that there was a scheme by the 1st, 2nd and 3rd defendants who have conspired and colluded with the 4th defendant to defraud the plaintiffs. The plaintiffs must stand or fall on the basis of which the *ex parte* injunction was obtained. They cannot change the case mid-stream and plead an entirely new cause of action to support their *inter parte* injunction. I would submit the plaintiffs were unsure of their case as seen from their changed position. I would submit the plaintiffs' entire cause of action is found on illegality which they themselves admit to. The entire transaction is tainted with illegality and therefore they say they are an innocent party. The defendants' case is that there is no illegality here and if there was an illegality as contended by the plaintiffs they were certainly a party to it by the action of the directors. If they were party to the illegality then they are not entitled to the remedy that they seek which is the Mareva injunction when their hands are unclean.

Submission By Counsel For The Plaintiffs

1. The equipments were listed in the delivery order exh. "SA1" encl. 14. Note that there was no identification or serial number on them. The 1st, 2nd and 3rd defendants have not given any evidence on the existence of these equipments. The 1st and 2nd defendants have said in their affidavit that they are in the process of compiling evidence of their own purchase of the said equipments from their own supplier but to date had not supplied any details. Nine months had passed.

2. Now see exh. "SA7" 1st defendant's account (of which the 3rd defendant shadow director is a signatory to this account) shows that on 29 August 2006 RM1.5 million was banked into the 1st defendant's account and the very same day two cash withdrawals of RM750,000 each were made totalling RM1.5 million corresponding to the loan sum taken from the 4th defendant. Note the 3rd defendant was a signatory of the 1st defendant's account. We had averred in para. 15 of encl. 26 affidavit in reply of the 2nd plaintiff which says the cash was taken by the 3rd defendant in collusion with the 2nd defendant. No reply was made to this averment. Further there

is a SMS message from the 2nd defendant exhibited as "SNR5" encl. 23 which says that he had nothing to do and the cheque for RM750,000 was solely signed by the 3rd defendant.

3. The company was set up in 2 September 2005. It has no track record of ever selling any equipment as the company record on 20 April 2006 from the ROC shows no trading.

4. We had only changed the statement of claim not this application to now make to include the bank as the 4th defendant with the consequential prayers.

Reply By Counsel For The Defendants

1. The common factual issue is whether the goods were delivered. The delivery order exh. "SA1" shows an acknowledgement by the 2nd plaintiff the managing director on 16 August 2006 that the goods were received in good order and condition. The same gentleman two days later in exh. "SA6" authorised the bank to disburse the loan sum to the 1st defendant. Their own documents show that the goods were delivered. Once the goods had been delivered and the plaintiffs had authorised the bank to release the payment to the 1st defendant there is no concern on the part of the plaintiffs as to who the 1st defendant paid the money to. Indeed the letter of authorisation to the bank issued by the 1st plaintiff was not even disclosed to the court when the *ex parte* was sought. With regards to the letter of authorisation, it is an afterthought as they had not disclosed it to the court that they had authorised the payment. It was an afterthought and it is a material of non-disclosure.

2. It is obvious that the plaintiffs themselves take the position by their amendments to their claim that the entire transaction with the 4th defendant is illegal.

Findings And Decision

[5] Essentially the plaintiffs' claim is based on the allegation that the 3rd defendant Hishamuddin had conceived of a scheme to defraud the plaintiffs into taking a loan from MIDF to purchase the light and sound equipments for the 1st plaintiff company's expanding business of events organizing.

[6] The scheme obliged the 1st plaintiff upon approval to release the approved sum of RM1.5 million from MIDF to the 1st defendant company to enable them to purchase the light and sound equipments with the 2nd and 3rd plaintiffs providing their personal guarantee for the loan that MIDF granted to the 1st plaintiff.

[7] The 2nd and 3rd defendants were directors of the 1st defendant company.

[8] The plaintiffs contend that they were deceived into signing all the documents relating to the release of the loan by MIDF including the acknowledgement of delivery of the equipments in order that MIDF will release the loan sum to the 1st defendant. After the loan was released into the account of the 1st defendant company the 2nd and 3rd defendants then withdrew it *vide* two cash withdrawals of RM750,000 each.

[9] The defendants on the other hand denied the alleged fraud and contend that the light and sound equipments had in fact been delivered to the 1st plaintiff.

[10] It is pertinent to note right from the start that at this stage all that the plaintiffs need to show is that there is a serious question to be tried following which the court has to decide where the balance of justice lies.

[11] As Lord Diplock said in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 at 407:

> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, *viz.* abstaining from expressing any opinion upon the merits of the case until the hearing" ... So unless the material available to the court at the hearing of the

application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[12] Having heard the submissions of the parties I am satisfied that there is a serious question to be tried on the core issue as agreed whether the 12 items of light and sound equipments had been delivered to and received by the 1st plaintiff. This will in turn determine the right of the plaintiffs to the injunctive relief based on fraud that they are now seeking.

[13] My reasons are as follows:

[14] The manner by which the sum of RM1.5 million was hurriedly withdrawn by the two cash withdrawals from the bank account of the 1st defendant company by the 2nd and 3rd defendants constitutes in my view, a good ground to indicate that the defendants may not have intended to use or did not use the loan obtained by the 1st plaintiff to purchase the equipments as agreed. The 2nd and 3rd defendants had not deemed it necessary to deny the specific deposition of the plaintiffs that the sum of RM1.5 million was taken out in the form of cash and given to the 3rd defendant.

[15] It is the plaintiffs' case that they had not received the equipments although they had acknowledged the delivery and receipt of all the 12 items and had also authorized MIDF to release the loan to the 1st defendant company. They had explained by the affidavits of the 2nd plaintiff (a director of the 1st plaintiff) the reasons why the 1st defendant did so. By para. 9 of his affidavit in support he said that the plaintiffs had to sign the delivery order only to ensure that MIDF will release the loan to the 1st defendant and by para. 13 of his subsequent affidavit dated 20 August 2006 he had also explained that he had authorized the bank to release the loan to enable the 1st defendant to obtain the money to purchase the equipments.

[16] The truth of the plaintiffs' narrative is of course not to be determined at this interlocutory stage but at the trial.

[17] It is true that there is an affidavit affirmed by MIDF's insurer's agent Sharuazhan to say that he had inspected the equipments and the premises where they were to be installed for insurance purpose. But he had omitted to state precisely what specific equipment or equipments he had inspected. His affidavit cannot be relied on to arrive at a conclusive and final finding that the equipments were delivered to the 1st plaintiff by reason that they were physically there.

[18] It is also true that the 1st defendant's general manager Oh Chee Kok had affirmed an affidavit claiming that he had delivered the equipments personally to the 1st plaintiff company. Given that he was an employee of the 1st defendant and therefore may be more inclined to favour the employer coupled with the fact that the equipments listed in his delivery order were only described but not identified by any specific identification or serial number, his deposition is to say the least suspect, the truth of which can only be properly assessed at the trial where he can be cross-examined.

[19] With respect to the submission of counsel for the defendants that the plaintiffs may have themselves been parties to the fraud which they had now built to justify this application, I must say that I am unable to conclude at this stage that the plaintiffs may have entered into any illegal transaction with the defendants. The submission that they should not be entitled to this injunction by reason of their unclean hands is therefore untenable at this stage. This does not mean that I have accepted their version of the narrative as true and accurate and that they were untainted and had indeed come with clean hands. These are necessarily matters which can only be resolved at the trial.

[20] The balance of justice it is clear to me, lies in favour of the plaintiffs.

[21] The purpose of their application at this stage is only to arrest the money which MIDF had released to the 1st defendant and which the 2nd and 3rd defendants (who were signatories of the 1st defendant's bank account), had taken out. Given that the RM1.5 million were so hurriedly and surreptitiously withdrawn from the bank account of the 1st defendant by the 2nd and 3rd defendants and given that the search conducted by the plaintiffs at the Registry of Companies had disclosed that the 1st defendant had not filed any financial nor any profit and loss statements since it was incorporated on 2 September 2005, the risk of dissipation is therefore real and not improbable.

[22] There shall be an order in terms of the application with the usual undertaking to damages.

Enclosures 21 And 18

[23] These are respectively the 1st and 2nd defendants', and 3rd defendant's applications to set aside the *ex parte* interlocutory injunction granted to the plaintiffs.

[24] Order 29 r. 1(2B) states that:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of 21 days from the date on which it is granted.

[25] It is clear that an interlocutory application obtained *ex parte* expires in 21 days. The onus lies with the plaintiffs to seek an *inter partes* hearing before the expiry. It is clear therefore that there is no plausible reason why the plaintiffs should take it upon themselves to apply to set aside the *ex parte* order obtained by the plaintiffs.

[26] The record shows that the *ex parte* injunction was granted on 20 October 2006. The defendants' application to set aside the *ex parte* order was fixed for hearing on the same day (20 October 2006) by which time the *ex parte* order had expired and would not have served any purpose. They were superseded by the holding over order that the late Justice Abdul Wahab Said Ahmad made pending the completion of this *inter partes* hearing. They should have therefore been withdrawn at the earliest opportunity so as not to burden the court with unnecessary applications.

[27] The applications to set aside were clearly superfluous and must therefore be dismissed with costs.

Enclosures 29 And 31

[28] (Defendants' applications to strike out certain paragraphs of the affidavit in reply of the 2nd plaintiff.)

[29] To be fixed for hearing on 19 September 2007